89-1993

Supreme Court, U.S.
FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

THE SUPREME COURT OF

THE UNITED STATES

1990 TERM

STUART A LARSEN

PETITIONER,

V.

DEPARTMENT OF THE NAVY

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a reasonable belief by a terminated federal employee, based on his awareness of investigations by federal agencies and potential prosecution by the United States Attorney's office, enough to allow that possible criminal defendant to wait, for expiration of the Statute of Limitations, before pursuing his administrative rights at hearings before the United States Merit Systems Protection Board?

2. Is it unreasonable for a terminated federal employee to be directed to report every sixty days to the United States Merit Systems Protection Board on the status of his possible prosecution and thus in turn to require the United States Attorney to issue prosecution decisions on a sixty day basis?

3. Is it unreasonable for the United States Merit Systems Protection Board to require a terminated federal employee to file for administrative hearings, under a twenty day filing rule, if their expediency of the rule has been diluted by an intervening five year wait for the expiration of a criminal Statute of Limitations?

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STATUTES

5 United States Code Section 7703 (Supp. IV, 1980)

5 Code of Federal Regulations Section 1201, 12 (1980)

PARTIES TO THE PROCEEDING WHOSE JUDGEMENT SHOULD BE REVIEWED:

A. THE UNITED STATES COURT OF APPEALS.

B. THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD.

C. THE UNITED STATES DEPARTMENT OF THE NAVY.

REPORTS OF OPINIONS

A. JUDGEMENT OF MARCH 8, 1990 UNITED STATES COURT OF APPEALS FOR FEDERAL CIRCUIT II 89-3379.

B. ORDER OF JUNE 29, 1989 BY THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD #SFO 7528910179.

C. ORDER OF MARCH 9, 1989 BY THE REGIONAL U.S. MERIT SYSTEMS PROTECTION BOARD #SFO 7528910179

GROUNDS FOR SUPREME COURT JURISDICTION

1. DATE OF REVIEWABLE JUDGEMENT MARCH 8, 1989.

2. STATUTE ALLOWING REVIEW: RULES OF THE SUPREME COURT: RULE 10.1(C)

CONSTITUTIONALITY OF AN ACT OF CONGRESS

The Court of Appeals For the Federal Circuit has not certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question in this matter.

PROVISIONS AND STATUTES INVOLVED IN THE CASE

A. AMENDMENT 5, CONSTITUTION OF THE UNITED STATES.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

B. Code of Federal Regulations

1201.22(b) "Appeals must be initiated with the Board within 20 days after the effective date of the action appealed."

STATEMENT OF THE CASE

By petition filed on September 29, 1983, the Petitioner, Stuart A. Larsen, moved for appeal of the action of the Department of the Navy, Military Sealift Command, Oakland, California, which removed him from the position of Financial Manager, GM-14 effective September 9, 1983.

The Petitioner was an employee as defined in 5 U.S.C. Section 7511(a) (1) (A).

The Petitioner requested a hearing in connection with his appeal to the Board. The hearing was scheduled to be held on December 20, 1983, at San Francisco, California.

Upon his discovery that a possible criminal prosecution was being contemplated in connection with the same matter, Petitioner requested leave to withdraw his appeal petition without

prejudice. The Board granted Petitioner's request on December 23, 1983.

A subsequent clarifying order was issued November 2, 1984 by Judge Mangan and the Board, directing that Petitioner will have 20 days from the date of declination of prosecution to file a timely appeal with the Board.

The Petitioner subsequently requested reopening of his appeal on November 29, 1988. This time period of five years passed because Petitioner was in danger of prosecution under Title 18 United States Code Section 201, since the statute of limitations as established (Title 18 United States Code Section 3282) is five years after commission of such an alleged offense.

The initial decision on the issue of reopening Petitioner's case was made on

March 9, 1989 by Judge Hughes at the San Francisco Regional Office. Judge Hughes dismissed the appeal as untimely.

Petitioner requested review of that initial decision filed on April 13, 1989 with the National Merit Systems Protection Board in Washington, D.C.

On April 27, 1989 the Agency asserted its support of Judge Hughes' initial decision which dismissed Petitioner's appeal as untimely.

On June 29, 1989 the Board issued an order that found the Petitioner's petition for review of the initial decision issued on March 9, 1989, was timely filed. However, the Board denied the Petitioner's petition because it did not meet the full criteria for review set forth at 5 C.F.R. Section 1201.115.

After briefs and oral arguments, the United States Court of Appeal for the Federal Circuit reviewed the Board's

final decision and affirmed on March 8, 1990. Federal Jurisdiction being on the basis of 5. U.S.C. 7703.

ARGUMENT

I. AN APPELLANT BEFORE THE U.S. MERIT SYSTEMS PROTECTION BOARD HAS A RIGHT TO A REOPENED HEARING WHEN HIS WITHDRAWAL FROM AN EARLIER HEARING WAS MADE TO PRESERVE HIS RIGHTS.

A. A federal civil service employee, in order to preserve his rights for appeal of a suspension or termination must demonstrate to the United States Merit Systems Protection Board that he acted with due diligence once he learned of his adverse protection rights. Casey v. Merit Systems Protection Board (Fed. Cir. 1984) 748 F.2d 685. The Appellant had filed a timely appeal and only after discovery of a possible criminal prosecution did he move to temporarily abate the proceedings. He then moved to reopen the proceedings after the statute of limitations had run on possible prosecution.

B. There is a reasonable excuse for meeting appellate time requirements. The doctrine of reasonable excuse clarifies that an excuse (such as the threat of self-incrimination) should be accepted by a presiding official absent substantial prejudice. CEJA v. U.S., (Fed. Cir. 1983) 710 F.2d 812.

That the threat of criminal prosecution existed is easily demonstrated by the known interest of the United States Attorney in the evidence revealed by the pre-termination investigation.

It is, in fact, the duty of the Agency to demonstrate that the excusal of time requirements creates substantial prejudice once the Appellant has demonstrated good cause for a delay. The Agency is burdened with a requirement to submit evidence that the untimely appeal

would prejudice it in this matter, because of the clear threat to the Appellant's right to avoid self-incrimination. Womack v. Merit Systems Protection Board, (Fed. Cir. 1986) 798 F.2d 453.

C. The criteria for allowing delay is reasonableness. Previous discussions have demonstrated a practical approach to the definition of "reasonable." Polcover v. Secretary of the Treasury, (D.C. Cir. 1955) 477 F.2d 1223. Since, in the matter under consideration, the statute of limitations is defined for the possible criminal prosecution, is it not entirely reasonable for Petitioner to depend on the adequate running of the statute? His delay was not frivolous, it was reasonable within the definition.

II. AN APPELLANT BEFORE AN ADMINISTRATIVE HEARING HAS THE RIGHT TO

POSTPONE HIS HEARING IF HIS RIGHT AGAINST SELF-INCRIMINATION IS COMPROMISED.

A. Despite the faulty claims of the Agency that the Appellant must demonstrate the level of threat burdening him to allow delay, no such demonstration is required. For in the matter of a threat to a citizen's right to avoid self-incrimination, there is no burden to prove the level of possible incrimination, because ironically, in making that very demonstration the self-incrimination could occur. There is no compelling surrender of a guaranteed right at administrative proceedings. Hoffman v. U.S. [71 S.Ct. 814 (1951)], 341 U.S. 479. It would appear that the Agency expected the Appellant to assert his rights only after he had compromised them.

B. The Fifth Amendment

protection against self-incrimination gives the right to the citizen of silence rather than harmful representation. It provides, for the administrative appellant, an alternative to presenting evidence in that venue and virtually delivering it, and himself, into the hands of the criminal justice system. Only when there is a bar to that self-provided evidence can there be a safe, and fair, administrative proceeding. Ellis v. U.S., (D.C. Cir. 1969) 4165 F.2d 791.

C. It is not up to the Appellant to decide the measure of what is a reasonable danger of prosecution. In this matter, the Appellant had a reasonable belief, based on the posture of the Agency, that referral to the criminal justice system was a very real possibility. Even where the danger of prosecution is slight, an Appellant has a

right to discontinue action in an administrative venue if prosecution appears possible at all. Compton v. Societe Eurosuisse S.A., (S.D. Florida 1980) 494 F.Supp. 836.

D. While an agency may assert that due process is not observed in delayed proceedings, the protections of the Fifth Amendment are not open to compromise. Due process cannot be served by an Appellant's too hasty compromise of his right against self-incrimination. If a serious criminal charge is possible, due process is best served by a clear observation of process without pressured self-incrimination. Silver v. McCamey, (D.C. Cir. 1955) 221 F.2d 873.

III. THE APPELLANT HAS DEMONSTRATED SUFFICIENT GOOD FAITH BY HIS ACTIONS TO BE GRANTED A DELAYED ADMINISTRATIVE HEARING.

A. The standard for a delayed hearing request is simple, diligent, and prudent action. There is no need for the Appellant to show unusual or impossible circumstances. A case by case treatment is to be given the decision to reopen. Phillips v. U.S. Postal Service, (Fed. Cir. 1982) 695 F.2d 1389.

B. Due process in and of itself does not demand haste. Haste can be prejudicial if a due process right (avoidance of self-incrimination) is compromised. While the Agency maintains because of their concern for convenience that haste is a necessity, it is not. U.S. v. Batson and Lemmons, (5th Cir. 1986) 782 F.2d 1307.

CONCLUSION

The Petitioner recognizes the delay caused by the five (5) year statute of limitations that concluded before his reapplication for hearing rights, but as

was stated in a previous case "... constitutional principles may not be violated for administrative expediency..." State of Maryland v. Environmental Protection Agency, (4th Cir. 1975) 530 F.2d 215, Affirmed 96 S.Ct. 2224 (1976).

Likewise the Petitioner recognizes the standards for the Board's setting aside of a case and contends that the failure to reopen a case is an abuse of discretion accorded the Board. Spezzaferro v. Federal Aviation Administration, (Fed. Cir. 1986) 807 F.2d 169.

The Petitioner is aware that the doctrine of administrative remedy is an old, established and wise one. He seeks not to bypass such a system, but to affirm it. Rosenthal & Co. v. Bagley, (7th Cir. 1978) 581 F.2d 1258.

The requirements of 5 CFR, as to appeal within 20 days, were never meant to obstruct due process. Too eager application of the rule is not in the interests of due process and should be held to be innocent error.

The Petitioner requests that the matter be returned by order, to the U.S. Merit Systems Protection Board for hearing on its merits, and that he be accorded the full and extended benefit of due process as protected by the Fifth Amendment privilege against self-incrimination.

DECLARATION OF MAILING

I, the undersigned, am a citizen of the United States, over the age of eighteen (18), and not a party to the within cause or proceeding; I am employed by the Law Offices of JAMES JAY SELTZER and my business address is 2200 Powell Street, Suite 1000, Emeryville, California 94608; I served the attached:

PETITION FOR A WRIT OF CERTIORARI

AND JOINT APPENDIX

by placing a true copy in an envelope addressed as follows:

STUART E. GERSON

Assistant Attorney General

DAVID M. COHEN

Director

STEPHEN J. McHALE

Assistant Director

SCOTT RAY, Attorney

Commercial Litigation Branch

Civil Division

Department of Justice

Attn: Classification Unit

2nd Floor, Todd Building

Washington, D.C. 20530

Tele: (202) 724-7227

which envelope was then sealed and posted by Federal Express to addressees, and, on the date set forth below, deposited at the Federal Express offices in Emeryville, California.

and by regular United States mail addressed to:

STUART A. LARSEN

4831 Proctor Road

Castro Valley, CA 94608

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 1990 at Emeryville, California.

Viviana D. Duncan

VIVIANA D. DUNCAN, Law Offices of
JAMES JAY SELTZER

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DECLARATION OF MAILING

I, the undersigned, am a citizen of the United States, over the age of eighteen (18), and not a party to the within cause or proceeding; I am employed by the Law Offices of JAMES JAY SELTZER and my business address is 2200 Powell Street, Suite 1000, Emeryville, California 94608; I served the attached:

PETITION FOR A WRIT OF CERTIORARI

AND JOINT APPENDIX

by placing a true copy in an envelope addressed as follows:

Soliciter General

Department of Justice

10th & Constitution Ave., N.W.

Room 5143

Washington, D.C. 20530

which envelope was then sealed and posted by Federal Express to addressees, and, on the date set forth below, deposited at the Federal Express offices

in Emeryville, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 1990 at Emeryville, California.

VIVIANA D. DUNCAN, Law Offices of
JAMES JAY SELTZER

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